November 5, 2004

Hon. Frederick K. Ohlrich
Clerk, California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***In re Anderson Hawthorne on Habeas Corpus***
Supreme Court No. S116670
[Related Case Nos. S097160; S065934; S004707]
Application of California Attorneys for Criminal Justice, Pursuant to this Court's October 29, 2004
Order, For Permission to File a Letter Brief in Support
of Petitioner and Letter Brief [Application Made Pursuant to Court Order; and Under Rule of Court 29.1(f)]

Dear Mr. Ohlrich,

This letter consists of an application for permission to file a letter brief and a letter brief on the merits in the above case submitted by California Attorneys for Criminal Justice (hereafter "CACJ"). The letter brief supports Petitioner Hawthorne. It is submitted pursuant to this Court's Order of October 29, 2004 granting a Motion to Establish Schedule for Filing of Amicus Briefs.

In addition, even though this is an original proceeding in this Court, and thus not an action covered by the exact letter of the California Rules of Court insofar as they define procedures for the filing of letters and briefs from *amici curiae*, CACJ notes that the Chief Justice can consider an application for permission to file a brief under California Rule of Court, Rule 29.1(f).

Because of the importance of the issues presented in and by this case, and for the reasons explained below, CACJ urges the Court to grant its application and to file this letter brief under the terms of its Order of October 29, 2004.

1. Identification of CACJ[1]

1. The undersigned, as co-chair of the amicus committee of CACJ, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law."

CACJ is administered by a Board of Governors consisting of lawyers practicing within the State of California. The organization has approximately 2,000 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout the State both in the public and private sectors.

CACJ has often appeared before this Court, the United States Supreme Court, and the Courts of Appeal in California on issues of importance to its membership. CACJ's appearance as an *amicus curiae* before this Court has been recognized in several of the Court's published decisions.

2. Statement of Interest of Amicus

CACJ has appeared on a number of occasions as an *amicus* in capital cases considered by this Court. CACJ has also expressed its interest in matters concerning the intersection between the death penalty and criminal defendants who may be mentally retarded.

In the aftermath of the United States Supreme Court decision in *Atkins v. Virginia*, (2002) 536 U.S. 304, CACJ provided input in to Senate Bill 3 of the 2003 Legislative Session. That Bill added Penal Code §1376 to the fabric of California law.

When the Los Angles Public Defender recently raised questions related to the assessment of mental retardation in a capital case pending in Los Angeles Superior Court, CACJ filed a letter brief in support of a grant of review, first in November, 2003 and again in May, 2004. See *Centeno v. Superior Court*, Supreme Court No. S124554 for the second of these letters. The *Centeno* case raised, among other things, questions about the proper scope of a mental retardation testing and assessment process, and the related judicial immunity, where the accused in a death penalty case is attempting to raise his or her mental retardation as a bar to the consideration of death as a penalty.

In addition, earlier this year CACJ received permission to appear before the Court of Appeal, Fifth Appellate District, in *People v. Superior Court (Vidal)*, Court of Appeal

---

additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

No. F045226. That case is pending a decision, and raises questions similar to those raised here about the definition of mental retardation that should be used in our courts.

In sum, CACJ has established its interest in the subject matter of this litigation.

CACJ'S LETTER BRIEF ON THE MERITS

1. Introduction

Respondent has argued that a prerequisite for mental retardation is an I.Q. score of 69 or below. (See Return at p. 2.) Respondent also argues that Petitioner has revealed no adaptive deficits consistent with mental retardation. (See Return at p. 3.) Respondent urges this Court to rule that mental retardation is not a bar to the death penalty here. Petitioner is arguing that Respondent is wrong on the threshold definition of mental retardation as a matter of law. He relies in part on the definition of mental retardation for use in capital cases contained in Penal Code §1376. (See Traverse at pp. 3-4.) Petitioner reviewed the history of the enactment of Penal Code §1376 in the Traverse to support the view that the California Legislature has rejected a definitive I.Q. "cutoff", or benchmark, as an 'element' or defining feature of mental retardation.

CACJ submits the following three arguments in support of Petitioner. First, Petitioner is right that there is a specific definition of mental retardation already in use in this State. CACJ adds that the implications of this Court's acceptance of Respondent's suggested definition would be to create a system in which one test for mental retardation is used at the trial level (Penal Code §1376(a)), while another is used in the post-conviction phase. That result is unwarranted and unworkable. Respondent fails to acknowledge that California law has historically used a definition of mental retardation that does not incorporate definitive I.Q. scores as a benchmark, and offers no legal basis for urging a result contrary to both the current state of the science and the everyday working definition of mental retardation in our State.

Second, California case law supports the notion that qualified experts are relied upon to provide interpretations of psychological tests (including tests of intelligence, cognitive abilities and adaptive functioning) against the backdrop of the current state of the sciences at issue. CACJ respectfully submits that this Court should not decide the fact of Petitioner's mental retardation if the record is insufficient, especially if the net result would be a likely finding that Petitioner was deprived, under federal law, of a full and fair hearing at this stage. Based on the arguments offered by the parties, there is a large risk of such an eventual finding in the absence of fully developed facts.

Third, this case provides the Court with an opportunity to consider how it will deal with both pre- and post-Penal Code §1376 cases that result in a death sentence, where the

issue of mental retardation must either (1) be adjudicated for the first time on appeal or habeas corpus, or (2) be subject to further post-conviction litigation to resolve incompletely determined questions of fact. CACJ anticipates it is likely that some *amici* may urge this Court to consider using not only the substantive definitions, but also the procedures, set forth in Penal Code §1376 as the blueprint for post-conviction litigation of the issue of mental retardation. As CACJ members are learning in litigating cases at the trial level, the procedures set out in Penal Code §1376 are not comprehensive. The statute does not define all of the procedures necessary to the adjudication of the question of mental retardation at the trial level, let alone in the post-conviction phase. Moreover, the procedures set out in Penal Code §1376 (b)(1) are not easily transferrable to a post-conviction litigation context. Clearly, however, Penal Code §1376 (a) embodies the California Legislature's definition of mental retardation that should be deemed pertinent not only to the trial, but also the post-conviction level.

2. Respondent's Arguments are Contrary Both to this Court's Rulings on the Interpretation of Legislation, and the Public Policy of Providing Courts, and the Public, with Laws that can be Given a Plain, Common Sense, and Clear Meaning

The central question posed by Respondent's arguments, given the current existence of Penal Code §1376, is: why would the California Attorney General argue to this Court that it makes sense to have two different definitions of mental retardation, as the basis for determination of whether an individual is death eligible in the aftermath of the United States Supreme Court's decision in *Atkins v. Virginia, supra*?

This Court has held that ". . . [i]n construing a statute, our task is to determine the Legislature's intent and purposes for the enactment." *People v. Garcia*, (2002) 28 Cal.4th 1166, 1172-73, relying in part on *People v. Tindall*, (2000) 24 Cal.4th 767, 762. A court must first look at the actual words of the statute, giving them a plain and common-sense meaning. If no ambiguity is detected in the language of the statute, then the Legislature is presumed to have meant what it said. (*Lennane v. Franchise Tax Board*, (1994) 9 Cal.4th 263, 268.) Where a statute is clear, courts are not supposed to interpret away the clear language in favor an ambiguity that does not exist. (*People v. Garcia*, *supra*, 28 Cal.4th at 1172-73.)

Where statutory language permits more than one reasonable interpretation, ". . . courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Torres v. Parkhouse Tire Service, Inc.*, (2001) 26 Cal.4th 995, 1003, relying on *Wilcox v. Birtwhistle*, (1999) 21 Cal.4th 973, 977.) Where there is ambiguity and more than one reasonable interpretation, the courts must select the construction that comports most closely, "with the apparent intent of the Legislature, with

a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences [citation omitted]." *Wilcox* at 977-978.

Admittedly, Respondent does not choose to interpret the question here as one of the implementation of legislative intent in connection with the definition of mental retardation. Nor, surprisingly, does Respondent seem concerned about the contradiction between arguments in favor of a specific type of I.Q. cutoff, and the existence of Penal Code §1376(a). Respondent's argument encouraging the highest Court in this State to embrace a definition of mental retardation that does not comport with the Legislature's historical, and current, definition of mental retardation as applied to criminal cases should not be accepted. Respondent is encouraging the distortion of an accepted legal definition to achieve a result in this case. The Court is essentially being asked to accept the logic of using a 'then' test for the adjudication of this case, in the face of the 'now' definition of mental retardation set forth in Penal Code §1376(a) that would apply to a case currently in litigation in California trial courts.

The definition of mental retardation as urged by Petitioner is not unique to Penal Code §1376. A similar definition is found in Penal Code §1001.20 (a). In addition, a similar definition of mental retardation is incorporated into Welfare & Institutions Code §6500, which does not include I.Q. cutoffs.

CACJ's argument is informed by the Court of Appeal's opinion in *In re Krall*, (1984) 151 Cal.App.3d 792 [hereafter *Krall* II], where the court interpreted a slightly dated version of Welfare & Institutions Code §6500. The petitioner there had been involved in more than one challenge to the judicial interpretation of the statute. Thus, the *Krall* II court reviewed a prior decision involving that same petitioner, *Money v. Krall*, (1982) 128 Cal.App.3d 378 [*Krall* I] in discussing the then-accepted definition of mental retardation. In *Krall* II, *supra*, 151 Cal.App.3d at 795-796, the Court of Appeal noted that mental retardation had been deemed to have an 'accepted technical meaning'. Mental retardation at the time was defined as encompassing significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, which appeared in the developmental period. This definition was in line with that contained in Penal Code §1001.20 (a). This, as will further be noted below, was largely the definition accepted at the time by the American Association on Mental Retardation.

The *Krall* II court reiterated the elements to be established for a finding of mental retardation in a Welfare & Institutions Code §6500 case. These included: (1) significantly subaverage general intellectual functioning; (2) that this functioning exists concurrently with deficits in adaptive behavior, and (3) that both of these deficits appeared in the developmental period. *Id*. at 797-798. These are essentially the elements built in to Penal Code §1376(a) and are the elements accepted by the experts on mental

retardation, nationally.

Given that California has consistently defined mental retardation in a way that can be described as prescient and in line with the pertinent science, it makes no sense for this Court to accept the argument that it should impose, as an isolated event for the purposes of this case, a definition that our State has not historically accepted in the last quarter century.

3. On Issues of Mental Health, Including where Mental Retardation is at Issue, California Cases Generally Support the Notion that Testimony from Experts Dealing with the Current State of the Sciences is an Accepted Means of Transmitting Necessary Evidence

This Court pointed out, in explaining the value of expert testimony where competence to stand trial is at issue, that: "'expert evidence is really an argument of an expert to the Court, and is valuable only in regard to the proof of the facts *with* and the validity of the *reasons* advanced for the conclusion.' [citations omitted, italics added.]" (*People v. Lawley*, (2002) 27 Cal.4th 102, 132, relying in part on *People v. Bassett*, (1968) 69 Cal.2d 122, 141.) This point is applicable wherever an expert testifies, and certainly where the expert is testifying about legally significant mental health issues.

Twenty years ago, the *Krall* II court stated: "Legislative recognition of the necessity for expert diagnosis and opinion upon a hearing to determine whether a person is mentally retarded is found in several code sections." *Id.* at 797-798. A number of different legislative schemes in existence in the early 1990s (and still in existence today), require expert examination to determine mental retardation, including the procedures outlined in: Penal Code §1001.22 [consultation with the Regional Center where a person is suspected to be mentally retarded within the meaning of Penal Code §1001.20 (a)]; Penal Code §1367, 1370.1 and 1600 et seq. [where a person is suspected to be developmentally disabled within the meaning of the trial competence statutes]; and Welfare & Institutions Code §5008 (a) which defines a procedure for evaluation requiring "multi-disciplinary professional analyses". The procedure is incorporated into Penal Code §1370.

In sum, the Legislature clearly intended to leave it to qualified professionals to assist courts in defining those persons who have developmental disabilities, including mental retardation.

Respondent argues as though the science applicable here (which CACJ understands will be explained at greater, and more informative, length by organizations that have traditionally dealt with mental retardation and mental disability) is static by offering the view that at some point a definitive I.Q. score became the accepted basis to

establish mental retardation. Pertinent scientific literature undermines the validity of this premise.

For example, the United States Supreme Court in *Atkins v. Virginia*, *supra*, at 309-310 referred to the *Diagnostic and Statistical Manual* (DSM) published by the American Psychiatric Association, currently embodied in the *DSM-IV-TR*. The current edition of the *DSM* explains, as have past editions, the manner in which the *DSM* is put together, and its historical background. (*DSM-IV-TR*, Introduction, at pp. xxiii-xxvi.) The authors have described the manner in which the *DSM-IV* was revised, literature was reviewed, data reanalyzed, and field trials undertaken. (Introduction at xxvi-xxvii.) In describing an evolving science, the *DSM* is not that different from another authoritative source on mental health and mental disorders referred to by the U.S. Supreme Court in *Atkins*--Kaplan and Sadock's (previously known as Sadock and Sadock) *Comprehensive Textbook of Psychiatry* (7th ed.). The *Comprehensive Textbook* is a standard reference work, sufficiently well-known that the United States Supreme Court noted it as one source for the definition of mental retardation. (*Atkins v. Virginia*, *supra*, 536 U.S. at 309-310, n.5.) The fact the *Textbook* is in its 7th edition demonstrates that evaluation protocols; definitions of symptoms; treatment methodologies; and diagnostic tools change and evolve as seen in most fields of science.

Evolution of the social sciences also explains why the AAMR *Mental Retardation: Definition, Classification and Systems of Supports* (10th ed.) includes a table tracking the definitions of mental retardation beginning in 1908 through the present. *Id*. at 20-23. Of significance to the current discussion is that beginning in 1959, the AAMR used phrasing paralleled in California statutes defining mental retardation. See AAMR *Mental Retardation,* at p. 21 referring to the 1959 Heber definition, which incorporated the element of subaverage general intellectual functioning originating during the developmental period.

This Court's extensive discussion of the role of testing in certain assessment processes in *People v. Stoll*, (1989) 49 Cal.3d 1136 undermines the notion that it makes sense to embrace a definitive, black letter, I.Q. test cutoff as defining a mental state, or developmental disability, where at least some of the factual basis for the determination of the accused's mental situation is dependent on the social sciences involved in psychological testing and mental state assessment.

In sum, not only do Respondent's arguments make no sense when placed against the background formed by the fabric of pertinent California law, but also, given the nature of the determination of mental health issues in our courts, the creation of a judicially mandated psychological testing result cutoff denies the parties the ability to establish the relevant and scientifically supported case facts.

4. At Issue in this Case is the Definition of Mental Retardation, not the Integration of all Penal Code §1376 Procedures into the Architecture of Post-Conviction Litigation

Counsel for Petitioner correctly argues that the definition of mental retardation found in Penal Code §1376 (a) is appropriate to use in capital cases. First, it is in line with the definition generally accepted in the pertinent governmental, and scientific communities. As the American Association on Mental Retardation notes, the assessment of mental retardation is undertaken in general for the purposes of establishing that a given individual is eligible for: services; benefits; or legal protections. (See AAMR, *Mental Retardation* (10th ed.) at p. 12.) As a result, the governments in this country have been interested in properly assessing mental retardation for some time, as have advocates for persons with developmental disabilities.

CACJ has demonstrated that California has historically defined mental retardation in a way that is consistent with the definitions used for both governmental, and scientific, purposes. The AAMR succinctly states that: "mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." (AAMR, *Mental Retardation (*10th ed.) at p. 13, describing the "operational definition" of mental retardation.)

Petitioner is correct to point towards the definition contained in Penal Code §1376 (a). That definition is consistent with nationally accepted definitions of mental retardation.

CACJ respectfully submits, however, that discussing a definition contained in Penal Code §1376 that parallels similar definitions found not only in the Penal Code, but elsewhere in California statutes and case law, does not amount to urging that this Court use the context of this litigation to fully incorporate Penal Code §1376 into the post-conviction litigation process. While aspects of Penal Code §1376 can be 'transported' from the trial to the post-conviction arena, there is no compelling reason, at this juncture, for this Court to graft Penal Code §1376 in its entirety into the post-conviction litigation process.

As trial lawyers who defend, and prosecute, capital cases in California have learned, the procedure for raising mental retardation in a trial level death penalty case is evolving. Virtually every aspect of the procedural system described in Penal Code §1376 is being tested, interpreted, and litigated differently depending on the jurisdiction, the court, and lawyers, involved.

CACJ hopes that, at most, this Court may refer to Penal Code §1376(b) *et seq.* as

outlining some procedures which may be of use in post-conviction litigation, much the same way as Referees appointed by the Court often refer to the reciprocal discovery provisions of Penal Code §1054 as guides to the regulation of post-conviction discovery when this Court has ordered an evidentiary hearing to allow the development of a factual record to allow a necessary determination in a capital case.

CONCLUSION

For the reasons stated here, this Court should reject Respondent's suggested definition of mental retardation, and accept the definition of mental retardation contained in Penal Code §1376 (a) and in the pertinent scientific literature referred to in *Atkins v. Virginia*, *supra*. The Court should allow the development of facts in this case after having determined the proper standard. Deciding the issue of mental retardation based on the current record appears to CACJ to be ill-advised, particularly if the Court is concerned about the current state of the pertinent sciences. Finally, if any part of Penal Code §1376 is to be designated for use in post-conviction litigation, it should be the definition of mental retardation contained in Penal Code §1376 (a) for the reasons discussed above.

Respectfully submitted,
JOHN T. PHILIPSBORN, State Bar No. 83944
CHARLES R. WEISSELBERG, State Bar No. 105015
Co-Chairs, Amicus Curiae Committee
California Attorneys for Criminal Justice

By: _____
JOHN T. PHILIPSBORN

cc: See attached list

Please reply to:

John T. Philipsborn
Law Offices
507 Polk Street, Suite 250
San Francisco, CA 94102
Telephone: (415) 771-3801
Telefax: (415) 771-3218
E-mail: jphilipsbo@aol.com

cc:

Harry Sunion
Assistant Federal Defender
Federal Public Defender's Office
321 East Second Street
Los Angeles, CA 9001-4202

Robert S. Henry
Deputy Attorney General
for the State of California
300 South Spring Street
Los Angeles, CA 90013

Anderson Hawthorne, Jr.
CDC #D-24801
San Quentin State Prison
San Quentin, CA 94974